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No. [redacted] 38

Supreme Court of the United States

OCTOBER TERM, 1964

RECORD NOT PRINTED

Alfred D. Rosenblatt,
Petitioner

v.

Frank P. Baer

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted
NIGHSWANDER, LORD & BOWNES
Conrad E. Snow, Associate
Attorneys for the Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

Alfred D. Rosenblatt,
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v.

Frank P. Baer

PETITION FOR WRIT OF CERTIORARI

NOW comes the petitioner in the above entitled action and respectfully petitions for a writ of certiorari, making the following representations, as required by Rule 23:

(A) REFERENCE:

Frank P. Baer v. Alfred D. Rosenblatt, Case No. 5211 in the Supreme Court of the State of New Hampshire. Copy of the Court's opinion is appended to this petition.

(B) CONCISE STATEMENT:

(I) Date of judgment sought to be reviewed: October 6,1964, "Judgment on the verdict".

(II) Date of order respecting rehearing: October 28, 1964, "Motion for rehearing denied".

(III) Statutory provision conferring jurisdiction: 28 U. S. C. s 1257 (3), "Final judgments or

decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court - - - (3) by writ of certiorari - - - where any title, right, privilege or immunity is specially set up or claimed under the Constitution - - - ".

(C) QUESTIONS PRESENTED FOR REVIEW:

(1) Whether a decision of the Supreme Court of New Hampshire, sustaining rulings and charge of a Trial Court which refused to grant the defense of privileged criticism to the defendant in a libel brought by a former public official for an alleged defamatory falsehood relating to his official conduct, is in violation of the First and Fourteenth Amendments to the Constitution of the United States of America;

(2) Whether a decision of the Supreme Court of New Hampshire holding that, in a libel suit brought by a former public official for an alleged defamatory falsehood relating to his official conduct, there was evidence of malice before the Trial Court which justified the submission of the issue of malice to the jury, is in violation of the First and Fourteenth Amendments to the Constitution of the United States.

(D) CONSTITUTIONAL PROVISIONS INVOLVED:

The First and Fourteenth Amendments of the Constitution of the United States, as applied in New York Times Company v. Sullivan, 84 S. Ct. 710 (March 9, 1964).

(E) CONCISE STATEMENT OF THE CASE:

On April 15, 1950, the Belknap County Commissioners who had the legal control of the Belknap Recreational Area at Gilford, New Hampshire, hired the plaintiff, Frank (Fritzie) P. Baer, as supervisor of the area. Their written agreement provided that Frank P. Baer will "supervise the collection and disbursement of all funds coming from or disbursed on account of said recreational area" (par. 5); "transmit all funds accruing from said recreational area to said county commissioners" (par. 6); "carefully examine all bills and invoices submitted relative to said recreational area and either approve or disapprove the same" (par. 7).

Under a renewed agreement, dated November 27, 1953, containing the above provisions, plaintiff continued as such supervisor until he was advised on June 23, 1959, that the county commissioners were exercising their right to terminate their contract effective July 10, 1959.

As of September 15, 1959, by virtue of Laws of N. H. 1959, c. 399, the operation of this area was placed in a commission of five members. Dana S. Beane, Jr. was its first chairman. In November, 1959, the commission hired Warren Warner as manager of the area.

Since 1958, the defendant, a merchant in Laconia, had regularly contributed a daily unpaid column in the Laconia Evening Citizen which was entitled "Out of My Head". Some of these articles, starting with one published on December 11, 1958, referred to the plaintiff in conjunction

with the Belknap Recreational Area.

Defendant's column, which is the basis of this action, was published January 29, 1960, when the plaintiff was no longer connected with the area. It read in part as follows:

> "Been doing a little listening and checking at Belknap Recreational Area and am thunderstruck by what am learning.
>
> "This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic, almost unbelievable.
>
> "On any sort of comparative basis, the Area this year is doing literally hundreds of per cent Better than last year.
>
> "When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following question:
>
> "What happened to all the money last year? and every other year? What magic has Dana Beane and rest of commission, and Mr. Warner wrought to make such tremendous difference in net cash results."

On March 9, 1960, the plaintiff instituted this action of libel alleging that the above article could be and was understood to mean "that the difference in the net cash results of the income of said Area was due because the plaintiff had committed larceny and that said money was stolen or embezzled or converted by the plaintiff to his own use," and that "said false, scandalous,

malicious and defamatory libels were calculated to bring plaintiff into hatred, contempt, ridicule."

The case was tried by jury in April, 1963, and a verdict returned on April 17, 1963, for the plaintiff in the sum of $31,500.

During the course of the trial the defendant claimed that the operation of the Belknap Mountain Recreation Area was a matter of public concern, and that, consequently, his article was privileged in the public interest. The Trial Court early in the trial determined that the operation of the Area was a matter of public concern. He told counsel in chambers:

"Before you say anything, I am going to say that I am going to rule at the appropriate time, based on what I've heard now, that the general subject matter was a legitimate matter of public concern which would give Mr. Rosenblatt the opportunity to raise the defense of privilege." Record P. 8.

This ruling was not, however, communicated to the jury, and the Court, subject to exception, refused to charge the jury that "The administration of the Belknap Area was a matter of public concern, and the criticism of its management by the plaintiff and the County Commissioners is privileged, even if defamatory, if said criticism is not malicious." Instead, the Court left to the jury the question whether the defendant had shown a "lawful occasion" for publishing the defamatory material.

The defendant further claimed that the plaintiff had produced no evidence of malice but the

Court, subject to exception, left the entire issue of malice to the jury.

(F) MANNER IN WHICH FEDERAL QUESTION WAS RAISED:

The federal question sought to be reviewed was not raised in the Trial Court, but was raised, after the decision in New York Times Company v. Sullivan, supra, in the defendant's brief filed with the Supreme Court of New Hampshire on April 30, 1964, in the following words:

"The Court's Charge and the Resulting Verdict are Violations of the First and Fourteenth Amendments to the United States Constitution."

"The verdict of $31,500.00 against the defendant, brought about by the failure of the Trial Court to grant defendant's motions for nonsuit and for directed verdict on the grounds of privilege, his failure to direct the jury that defendant's published criticism was a matter of public concern, and that defendant was entitled to the defense of privileged criticism, his leaving to the jury the issue of malice of which there was no evidence, and his placing the burden on the defendant to prove the truth of his criticism, was a violation of the First and Fourteenth Amendments of the United States Constitution."

The brief went on to quote, in extenso, New York Times Company v. Sullivan.

The Supreme Court of New Hampshire passed upon defendant's contention in the following words:

"We consider next the following argument of the defendant as stated in his brief quoting the above from defendant's brief]. Reliance for this position is placed on New York Times Company v. Sullivan, 84 S. Ct. 710 (1964).

"The Times case was an action for libel brought by one of three elected commissioners of the city of Montgomery, Alabama, as a result of a Times 'editorial' advertisement communicating information, expressing opinion, reciting grievances, protesting claimed abuses, and seeking financial support on behalf of certain negro movements. A verdict of $500,000 was returned for the plaintiff. 'Under Alabama law as applied in this case, a publication is 'libelous per se' if the words 'tend to injure a person . . . in his reputation' or to 'bring (him), into public contempt . . . Once 'libel per se' has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars . . . Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight . . . Unless he (defendant) can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury." New York Times Company v. Sullivan, supra, 719.

"The court held that the First and Fourteenth Amendments of the Federal Constitution require a federal rule that 'prohibits a public

official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - - - that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Id., 726. This rule 'delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.' Id., 727.

"Under New Hampshire law even if there is a libel per se defendant need not prove the truth of the stated facts to escape liability. He may escape liability if he proves a privilege by showing that the facts (although untrue) were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of their truth. Chagnon v. Union-Leader Co., 103 N. H. 426, 438. 'This is a very different thing from showing the actual truth.' Carpenter v. Bailey, 53 N. H. 590, 594. It has long been our law that good motives and belief in truth are strong circumstances to rebut any inference of malice. State v. Burnham, 9 N. H. 34, 44. Carpenter v. Bailey, supra.

"Under New Hampshire law, unlike the Alabama law which prevailed in the Times case, even if the defendant in an action based on a libel per se cannot prove the truth or substantial truth of what was published, there can be no recovery if the defendant establishes the defense of privilege and it is not rendered

inoperative by his actual malice which is not to be presumed but proved by the plaintiff. Lafferty v. Houlihan, 81 N. H. 67; Hutchins v. Page, 75 N. H. 215. Furthermore, our cases require that a plaintiff, be he a public official or not, must prove by a preponderance of the evidence that the libelous statements were defamatory of him and also the extent of the damage which they caused. Chagnon v. Union Leader Co., 103 N. H. 426, 436. Our law also demands that all plaintiffs prove that the defamatory publication applied to them. We do not subscribe to the proposition rejected in the Times case that 'an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations.' New York Times Company v. Sullivan, 84 S. Ct. 710, 732.

"The Trial Court correctly charged the jury on all these applicable principles of law. The instructions did not require the defendant to prove the truth of a privileged communication if it was made with good motives and reasonable belief of its truth. We have ruled that the record contained sufficient evidence to warrant a finding that the plaintiff has sustained his burden of proving actual malice by the defendant. We find no conflict with the Times decision."

(H) ARGUMENT:

It is submitted that the New Hampshire Court has decided a federal question of substance in a manner not in accordance with the decision of

the United States in New York Times Co. v. Sullivan, with the result that the defendant has been subjected to an unjust, illegal and unconstitutional judgment of $31,500.00.

It was the defendant's contention at the trial of the case, and before the Supreme Court of New Hampshire, that the manner of the operation of the Belknap Mountain Recreation Area, an institution owned and operated by Belknap County, by the plaintiff as manager for the County Commissioners, was a matter of public concern (and the Trial Judge so ruled in chambers), and that the defendant's comment on the apparent discrepancy between the cash receipts under plaintiff's management and those under a new and succeeding management by an independent commission, and his inquiry, "What happened to all the money last year? and every other year?" was privileged in the public interest. Defendant duly moved for a nonsuit on these grounds, and that being denied, duly requested instructions to the jury to this effect and excepted to the Court's refusal to so charge. The plaintiff claimed that any privilege the defendant might have was negatived by malice, to which the defendant replied that the plaintiff had produced no evidence of malice. The Court, subject to defendant's exception, let the issue of malice go to the jury. All of the issues raised by the failure of the Court to make a specific ruling that the portion of the article complained of was a matter of public concern, the failure of the Court to charge the jury that the defendant's article was privileged in the

public interest, in the absence of malice, and the failure of the Court to withdraw the issue of malice from the jury as requested, were duly protected by exception, reserved for the Supreme Court, and argued in defendant's brief.

In March, 1964, while defendant's brief was in preparation, the Supreme Court handed down the decision in New York Times Co. v. Sullivan. It then became apparent that defendant had an additional defense. As the New Hampshire Supreme Court recognizes in its opinion, the Supreme Court of the United States there held that the First and Fourteenth Amendments of the Federal Constitution require a federal rule that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - - - that is, with knowledge that it was false or with reckless disregard of whether it was false or not;" and also held that proof to show actual malice must have the "convincing clarity which the constitutional standard demands." This decision was obviously a constitutional approach to the same objective which the defendant had sought from the beginning of the trial, - - - protection through his privilege, because of the public interest. The plaintiff had been a public official (in fact, he was a candidate for reappointment) who was seeking damages for an allegedly defamatory falsehood relating to his official conduct. This being so, he should not have been allowed to recover unless the plaintiff produced evidence of "actual malice" on the part of the defendant.

The Supreme Court of New Hampshire has evaded the ruling of the United States Supreme Court in two ways.

First, it has produced a definition of malice which in effect makes all libel malicious. In its opinion the Court sustained a charge of the Trial Court which defined malice as "ill will, evil motive, intention to injure or a wanton or reckless disregard of the rights of others. Malice - - - may consist of the intentional publication of defamatory matters with a reckless disregard of the rights of others, and it may consist of willfully doing an act or a willful neglect of an obligation which the writer knows is liable to injure another, regardless of the consequences, even though there is no intention to hurt or harm an individual." Since the publication of a libel must always be intentional, and since the matter, being defamatory must necessarily be liable to injure another, to the publisher's knowledge, and since it is published, "regardless of consequences," it follows under the Court's definition that the publication may always be found to be malicious, even though there was no intention to hurt or harm anybody. It is submitted that this definition of malice entirely subverts the decision of the Supreme Court of the United States which requires "actual malice" in the case of a public official seeking damages for a defamatory falsehood relating to his official conduct.

Secondly, the Supreme Court of New Hampshire sets up certain matters as constituting evi-

dence of malice, but which defendant submits lack the "convincing clarity which the constitutional standard demands". In outline, the Supreme Court of New Hampshire holds that the following is evidence of malice in the instant case:

1) Absence of probable cause in the sources of information given by the defendant as the basis for his statements;

2) That in another article defendant asked a series of questions about the operation of the Area, and insisted on an answer from the County Commissioners or the plaintiff;

3) That in two other articles defendant wrote that the Area was "an antique relic run for the benefit of one family," and commented on the fact that plaintiff had a "substantial portion of his own family on the County payroll," - - - to which he added "nepotism hardly best kind public policy." In fact, the plaintiff's wife, son and daughter-in-law did work at the Area;

4) The alleged defamatory question asked by the defendant which is the basis of the action itself.

The Court said: "Any or all of the statements in these articles could be considered by the jury in their determination of whether the defendant was actuated by malice." None of the evidence meets the constitutional standard with convincing clarity.

In the consideration of this issue it will be necessary for the Court to have before it the transcript of the evidence in the case, and in particular the text of defendant's articles referring to plaintiff, which are printed in the appendix to the defendant's brief.

(I) COPY OF OPINION DELIVERED BY SUPREME COURT OF NEW HAMPSHIRE. (appended)

(J) JUDGMENT OF SUPREME COURT OF NEW HAMPSHIRE:

"Judgment on the verdict."

Alfred D. Rosenblatt, Petitioner

NIGHSWANDER, LORD & BOWNES
Conrad E. Snow, Associate

By: Conrad E. Snow .....
His Attorneys

Appendix

OPINION OF SUPREME COURT OF NEW HAMPSHIRE

Belknap,
No. 5211.

FRANK P. BAER v. ALFRED D. ROSENBLATT

Argued June 2, 1964.

Decided October 6, 1964.

Action for libel of the plaintiff by the defendant in an article written by him and published in the Laconia Evening Citizen on January 29, 1960.

Trial by jury resulted in a verdict for the plaintiff in the amount of $31,500.

Certain exceptions of the defendant were reserved and transferred by Grant, J.

Doherty & Dyer and McLane, Carleton, Graf, Greene & Brown (Mr. Stanley M. Brown orally), for the plaintiff.

Nighswander, Lord & Bownes and Conrad E. Snow (Mr. Hugh H. Bownes orally), for the defendant.

LAMPRON, J. On April 15, 1950, the Belknap county commissioners who had the legal control of the Belknap Recreational Area at Gilford, hired the plaintiff, Frank (Fritzie) P. Baer, as supervisor of the area. Their written agreement provided that Frank P. Baer will "supervise the collection and disbursement of all funds coming from or disbursed on account of said recreational area" (par. 5); "transmit all funds accruing from said recreational area to said county commissioners" (par. 6); "carefully examine all bills and invoices submitted relative to said recreational area and either approve or disapprove the same" (par. 7).

Under a renewed agreement, dated November 27, 1953, containing the above provisions, plaintiff continued as such supervisor until he was advised on June 23, 1959, that the county commissioners were exercising their right to terminate their contract effective July 10, 1959.

As of September 15, 1959, by virtue of Laws 1959, c. 399, the operation of this area was placed in a commission of five members. Dana S. Beane, Jr. was its first chairman. In November, 1959, the commission hired Warren Warner as manager of the area.

Since 1958, the defendant, a merchant in Laconia, regularly contributed a daily unpaid column in the Laconia Evening Citizen which was entitled "Out of My Head." Some of these articles, starting with one published on December 11, 1958, referred to the plaintiff in conjunction with the Belknap Recreational Area.

Defendant's column, which is the basis of this action, was published January 29, 1960, when the plaintiff was no longer connected with the area. It read in part as follows:

"Been doing a little listening and checking at Belknap Recreational Area and am thunderstruck by what am learning.

"This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic, almost unbelievable.

"On any sort of comparative basis, the Area this year is doing literally hundreds of per cent Better than last year.

"When consider that last year was excellent snow

year, that season started because of more snow, months earlier last year, one can only ponder following question:

"What happened to all the money last year? and every other year? What magic has Dana Beane and rest of commission, and Mr. Warner wrought to make such tremendous difference in net cash results."

On March 9, 1960, the plaintiff instituted this action of libel alleging that the above article could be and was understood to mean "that the difference in the net cash results of the income of said Area was due because the plaintiff had committed larceny and that said money was stolen or embezzled or converted by the plaintiff to his own use," and that "said false, scandalous, malicious and defamatory libels were calculated to bring plaintiff into hatred, contempt, ridicule."

On March 6, 1963, approximately three years after plaintiff instituted this action, the defendant moved for a change of venue. He based his motion on the fact that he "as a columnist has frequently made forthright, caustic, and barbed remarks about many affairs in the City of Laconia and in Belknap County, including . . . the management past and present of the Belknap County Recreation Area" and that his remarks "have undoubtedly ruffled the feelings of many people in Belknap County and have made him an object of antagonism by many people in Belknap County." "Some people admire his forthright comments . . . and many other people dislike him intensely for the comments." He alleged that for this and other reasons it was probably impossible he would receive a fair and impartial trial in Belknap county.

The Superior Court has authority to change the venue in an action. RSA 507:11; Cocheco R.R. v. Farrington, 26 N.H. 428, 445. A change should be made if

there is probable ground to apprehend that a fair and impartial trial cannot be had in the particular county. Hilliard v. Beattie, 58 N.H. 112. This is a matter within the discretion of the Trial Court whose determination will not be disturbed unless a plain abuse of that discretion is shown. Whitcher v. Association, 77 N.H. 405, 407. The record does not compel a conclusion that there was abuse. State v. Small, 99 N.H. 349, 352.

We agree with the statement in defendant's briet that "It seems clear that the questions of whether or not the plaintiff was within the orbit of the words of the article and whether the article imputed wrong-doing to the plaintiff were properly left for jury determination." As it could be found that the newspaper article complained of was defamatory of the plaintiff and damaging to him, the defendant could properly be found liable unless the publication was justified or excused.

Justification is established if the facts stated are true and are published with a justifiable motive. Hutchins v. Page, 75 N. H. 215; Chagnon v. Union-Leader Co., 103 N. H. 426, 437. There was ample evidence to warrant a finding by the jury that the defamatory statements of facts made in this column were not substantially true and that the comments made thereon were unjustified. Restatement, Torts, s. 582, comment e; Prosser, Torts (2d ed.) s. 96, p. 632.

"Even though a defendant cannot justify the publication because it can be found to be untrue he may excuse it by showing it was privileged. A conditional privilege, which is what is claimed here, is established if the facts, although untrue, were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of its truth." Chagnon v. Union-Leader Co., supra, 438.

Statements of facts and comments based thereon made by the defendant about the management of the Belknap Recreational Area could be found to constitute a lawful occasion and the basis of a privilege. However they would constitute a lawful occasion and a privilege only if they were published in good faith and with a belief, founded on reasonable grounds, of their truth. State v. Burnham, 9 N. H. 34; Lafferty v. Houlihan, 81 N. H. 67, 71. A court, therefore, cannot rule that a communication is privileged in the public interest without assuming the conditions on which it is held to be privileged, namely, that it was made with good motives and upon probable grounds of its truth. Lafferty v. Houlihan, supra, 72. Where, as in this case, the motives of the defendant and his basis for believing his statements to be true were both in controversy, the Trial Court properly denied defendant's motion that it rule before trial that his article, in the absence of malice or bad faith, was privileged in the public interest.

For the same reason the Trial Court properly refused defendant's request that the jury be charged as a matter of law that there was a lawful occasion for the publication of defendant's article. An examination of the Court's charge in its entirety reveals that the jury was properly instructed on these issues.

The law is well established that a defamatory statement made with malice cannot be excused as privileged. Chagnon v. Union-Leader Co., 103 N. H. 426, 438. Also when the element of malice enters into the wrong the rule of damages is different and more liberal. Bixby v. Dunlap, 56 N. H. 456, 462, 463. The burden of proving malice to defeat the defense of privilege as well as to invoke the more liberal rule of damages is on the plaintiff.

Hutchins v. Page, 75 N. H. 215; Saladino v. Gurdy, 80 N. H. 211; 1 Harper & James, Law of Torts, s. 5. 27, p. 455. The Trial Court properly defined malice in its charge to the jury as "ill will, evil motive, intention to injure or a wanton or reckless disregard of the rights of others. Malice . . . may consist of the intentional publication of defamatory matters with a reckless disregard of the rights of others, and it may consist of willfully doing an act or a willful neglect of an obligation which the writer knows is liable to injure another, regardless of the consequences, even though there is no actual intention to hurt or harm an individual." Chagnon v. Union-Leader Co., supra; New York Times Company v. Sullivan, 84 S. Ct. 710, 726 (1964).

The defendant stated in part in the article complained of "Been doing a little listening and checking at Belknap Recreation Area and am thunderstruck by what am learning. This year, a year without snow till very late . . . the difference in cash income simply fantastic, almost unbelievable. On any sort of comparative basis, the Area this year is doing literally hundreds of per cent Better than last year. When consider last year was excellent snow year . . . one can only ponder following question: What happened to all the money last year? and every other year?"

Defendant testified that by "literally hundreds of per cent Better" he meant to say that the cash income for "this year" was more than twice but not necessarily more than three times what it was "last year." The jury could find on the evidence that on the figures available when defendant wrote his article there was very little difference in the cash income for the two years compared in defendant's column.

Defendant testified "had I not been told that there was a great difference between that January and the other January, I would probably not have had occasion to write the article." There was evidence from which the jury could find that the sources of information given by the defendant as bases for his statements gave no support for what he wrote. "Probable cause is undoubtedly a circumstance, and a strong one, to rebut any presumption of malice; as the absence of it is evidence to show malice." State v. Burnham, 9 N. H. 34, 44; Shackett v. Bickford, 74 N. H. 57; 1. Harper & James, Law of Torts, s. 5.27, p. 455; 33 Am. Jur., Libel and Slander, s. 266, p. 248.

In an article dated January 9, 1959, defendant asked a series of questions about the operation of the area which he invited the plaintiff or the county commissioners to answer. On January 12, plaintiff's son, who worked at the area, endeavored to answer these questions by a letter to the editor published in the Laconia Evening Citizen and in it he also invited defendant to obtain a copy of all area expenditures and income at the county court house and stated that "I do feel that the best answers to all the people's doubts and questions can best be answered by the County Comm., County delegation members, and Area management at the annual Budget meeting open to all County residents. This meeting is coming up soon." On January 21, defendant published in his column that he had not yet heard from the plaintiff and the commissioners as to these questions. On January 27, defendant's column stated that the plaintiff in a public speech on January 22, said he was not going to answer the questions and defendant asked "why."

In an article published February 14, 1959, the de-

fendant characterized the area as "an antique relic run for benefit of one family and favored few friends." June 25, 1959, after plaintiff's employment had been terminated, defendant wrote "Commishes responsible for hiring and firing of County personnel. That their legal duty and obligation cannot offhand simply assume they did it without reason. Maybe they had darned good reasons. Not fair to jump to conclusions without having asked them. After all Fritzie did have substantial portion of his own family on County payroll. Maybe this good . . . maybe not. Certainly on face of it, nepotism hardly best kind public policy." January 29, 1960, the column which is the basis of this action asked "What happened to all the money last year? and every other year?" The plaintiff was supervisor of the area in charge of income and disbursements during the time inquired about.

Any or all of the statements in these articles could be considered by the jury in their determination of whether the defendant was actuated by malice in publishing the article of January 29, 1960. Saladino v. Gurdy, 80 N. H. 211, 213; II Wigmore, Evidence, ss. 403, 404. We are of the opinion that the jury could find on the evidence that the defendant lacked reasonable grounds to believe in the truth of the statements he published; that by his prior utterances he demonstrated animosity toward the plaintiff; and that the defamatory statements, which are the basis of this action, were published with actual malice and consequently not privileged. Chagnon v. Union-Leader Co. 103 N. H. 426, 440.

We consider next the following argument of the defendant as stated in his brief. "The verdict of $31,500 against the defendant, brought about by the failure of the Trial Court to grant defendant's motions for nonsuit and for directed verdict on the grounds of privilege, his

failure to direct the jury that defendant's published criticism was a matter of public concern, and that defendant was entitled to the defense of privileged criticism, his leaving to the jury the issue of malice of which there is no evidence, and his placing the burden on the defendant to prove the truth of his criticism, was a violation of the First and Fourteenth Amendments of the United States Constitution." Reliance for this position is placed on New York Times Company v. Sullivan, 84 S. Ct. 710 (1964).

The Times case was an action for libel brought by one of three elected commissioners of the city of Montgomery, Alabama, as a result of a Times "editorial" advertisement communicating information, expressing opinion, reciting grievances, protesting claimed abuses, and seeking financial support on behalf of certain negro movements. A verdict of $500,000 was returned for the plaintiff. "Under Alabama law as applied in this case, a publication is 'libelous per se' if the words 'tend to injure a person . . . in his reputation' or to 'bring (him), into public contempt . . . . Once 'libel per se' has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars . . . . Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight . . . . Unless he (defendant) can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury." New York Times Company v. Sullivan, supra, 719.

The court held that the First and Fourteenth Amendments of the Federal Constitution require a federal rule that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official con-

duct unless he proves that the statement was made with 'actual malice' - - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id., 726. This rule "delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." Id., 727.

Under New Hampshire law even if there is a libel per se defendant need not prove the truth of the stated facts to escape liability. He may escape liability if he proves a privilege by showing that the facts (although untrue) were published on a lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of their truth. Chagnon v. Union-Leader Co., 103 N. H. 426, 438. "This is a very different thing from showing the actual truth." Carpenter v. Bailey, 53 N. H. 590, 594. It has long been our law that good motives and belief in truth are strong circumstances to rebut any inference of malice. State v. Burnham, 9 N. H. 34, 44. Carpenter v. Bailey, supra.

Under New Hampshire law, unlike the Alabama law which prevailed in the Times case, even if the defendant in an action based on a libel per se cannot prove the truth or substantial truth of what was published, there can be no recovery if the defendant establishes the defense of privilege and it is not rendered inoperative by his actual malice which is not to be presumed but proved by the plaintiff. Lafferty v. Houlihan, 81 N. H. 67; Hutchins v. Page, 75 N. H. 215. Furthermore, our cases require that a plaintiff, be he a public official or not, must prove by a preponderance of the evidence that the libelous statements were defamatory of him and also the extent of the damage which they caused. Chagnon v. Union-Leader Co., 103 N. H. 426, 436. Our law also demands

that all plaintiffs prove that the defamatory publication applied to them. We do not subscribe to the proposition rejected in the Times case that "an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." New York Times Company v. Sullivan, 84 S. Ct. 710, 732.

The Trial Court correctly charged the jury on all these applicable principles of law. The instructions did not require the defendant to prove the truth of a privileged communication if it was made with good motives and reasonable belief of its truth. We have ruled that the record contained sufficient evidence to warrant a finding that the plaintiff has sustained his burden of proving actual malice by the defendant. We find no conflict with the Times decision.

Defendant's motion to set aside the verdict as excessive was denied by the Trial Court. We set out in Chagnon v. Union Leader Co., supra, 446 the standard for our action in the circumstances: "The consideration of the defendant's motion involved questions of fact for the Judge and his decision will not be set aside unless no reasonable person would make it . . . . In most jurisdictions the view is taken that the Trial Judge, because of his more favorable position to determine the weight of the evidence and assess all the circumstances involved, may more freely interfere with the verdict than the appellate court and that his decision upon this question will be given great weight in passing upon the question on appeal." We also stated therein that the verdict in this case "must be assayed in the frame work of our rule that 'when the element of malice enters into the wrong a more liberal rule of damages prevails.'" Id.

The evidence showed that the plaintiff's earnings increased from a low of $7,150 in 1954 to about $8,000

in 1958 which was his rate of pay at the area when his employment was terminated effective July 10, 1959. His life expectancy was shown to be 15.44. He was 61 at the time of the trial in 1953. His earnings for 1960 were about $300, for 1961 they were $6,491.82 and $5,994.50 for 1962. From the evidence the jury could find that but for the defendant's libel the plaintiff would probably have secured employment at $8,000 per year in the ski or motorcycle industry or in similar lines of work. He had experience in public relations with the motorcycle industry and in managing a ski area. Consequently the jury could properly find a loss of earning caused by the libel of $7,000 in 1960, about $1,500 in 1961, and $2,000 in 1962 for a total of $10,500.

According to the evidence the effect of the article still continued at the date of the trial in April, 1963. "When Mr. Baer's name was mentioned, this fact of him being fired or let go from the Area came up at the same time." The jury could properly find as the natural and proximate result of the publication probably loss of future earnings for at least four more working years (to age 65), which on previous figures could amount to $6,000 or more. Chagnon v. Union Leader Co., 103 N. H. 426, 441.

When as in this case, the jury could find that the defamatory publication charged the plaintiff with a crime or with activities which would tend to injure him in his trade or business, plaintiff can recover for damages to his reputation resulting therefrom. Id.

Lastly there was evidence from which the jury could find actual malice on the part of the defendant and could award damages for mental distress and vexation which cannot be made the subject of exact pecuniary compensation. Restatement, Torts, s. 623. Also on a finding of malice a different and more liberal rule of damages pre-

vails, that is, the jury is to "endeavor, according to their best judgment, to award such damages by way of compensation or indemnity as the plaintiff on the whole ought to receive and the defendant ought to pay." Bixby v. Dunlap, 56 N. H. 456, 464. We cannot say that the jury verdict did not come within that norm or that the Trial Court acted as no reasonable person would in refusing to set the verdict aside. Wisutskie v. Malouin, 88 N. H. 242, 246.

We consider next defendant's argument that the Trial Court should have permitted the introduction of evidence as to the disposition of a libel suit brought by plaintiff's son against the defendant based on the same article. This suit had been marked "Voluntary Nonsuit." The Trial Court instructed the jury that any other lawsuit arising out of this article and the disposition made of it has no bearing on the issues before them and should be disregarded. We see no error in this ruling. SayKaly v. Manchester 97 N. H. 4, 5; Masterson v. Berlin Street Ry, 83 N. H. 190.

Defendant also excepted to the refusal of the Trial Court to admit evidence of the bringing and disposition of a suit brought by the plaintiff against the publisher of the newspaper in which defendant's column appeared. This action was settled for $2,000 on a covenant not to sue. The Court properly excluded this evidence and the amount received should be deducted from the verdict returned in the present action. Masterson v. Berlin Street Ry, supra; Martel v. Wallace 83 N. H. 276, 279; Burke v. Burnham, 97 N. H. 203, 212.

Judgment on the verdict.

KENISON, C. J. concurred in the result; the others concurred.